APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-00-1973

BASE METAL TRADING, LTD.

Plaintiff

v.

OJSC "NOVOKUZNETSKY ALUMINUM FACTORY"

Defendant

MEMORANDUM AND ORDER

This Court has before it the Motion to vacate Order Establishing Escrow Account and the materials submitted relating thereto. The Court has conferred with counsel and finds a formal hearing unnecessary.

The matter can be discussed succinctly. During the years 1995 through 1999, Plaintiff Base Metal Trading, Ltd., a metal dealer, and Defendant NKAZ, a Russian aluminum producer, had various business dealings. A dispute arose which ended up with the December 10, 1999 issuance of a Russian arbitration award in favor of BMT and against NKAZ in the amount of approximately $12,000,000. *Vis-a-vis* NKAZ, Plaintiff BMT seeks confirmation of the arbitration award.

The dispute between Plaintiff and Defendant had no connection with the District of Maryland. Nevertheless, on

or about June 28, 2000, a foreign vessel, M/V SALVADOR, carrying some 2,563 metric tons of aluminum docked in the Port of Baltimore. On June 29, 2000, Plaintiff BMT filed a Motion under Rule 64 of the Federal Rules of Civil Procedure seeking seizure or attachment of the aluminum that was alleged to be the property of Defendant NKAZ. The motion was granted and the property was taken into custody by the U.S. Marshal. Shortly thereafter, MG Metal & Commodity Corp. and MG Metal & Commodity Co., Ltd (collectively "MG") claimed ownership of the seized aluminum and moved to vacate the attachment. On July 7, 2000, the Court issued an Order vacating the attachment, giving MG custody and control of the aluminum, and providing for the placement into an escrow account of any funds derived from the sale of the aluminum. The purpose of the July 7 Order was to permit MG to deal with the metal while preserving the status quo by having the escrowed funds stand in the place of the metal while the merits of the attachment were sorted out.

At this time, at least a portion of the metal at issue has been sold and the proceeds placed in escrow. MG has presented evidence satisfying the Court that it is solvent and would be able to satisfy a judgment in an amount substantially greater than the value of the metal that was seized. Moreover, MG has acknowledged that if a claim is made against it by Plaintiff, it would be subject to the jurisdiction of this Court with respect to an amount equal to the value of the seized metal.

Under the circumstances, the Court does not find there to be a valid reason to continue the seizure or escrow arrangement in effect. If Plaintiff decides to proceed with its claim against MG in this Court, it will have an opportunity to do so promptly.

For the foregoing reasons:

1. The Motion to Vacate Order Establishing Escrow Account shall be GRANTED.

2. The Court shall, briefly, defer issuing an Order granting the Motion to afford Plaintiff the opportunity to file a claim against MG in this Court while the subject metal (and the escrow account held as a substitute for the metal) are within the jurisdiction of the Court.

3. By October 23, 2000, Plaintiff shall file any claim against MG relating to the metal at issue.

So ORDERED this 18th day of October, 2000.

/s/
Marvin J. Garbis
United States District Judge

APPENDIX F

INTERIM PROVISION ON COURTS OF ARBITRATION FOR ECONOMIC DISPUTES

ADOPTED BY THE SUPREME SOVIET DECREE OF JUNE 24, 1992

AS AMENDED BY RUSSIAN FEDERAL LAW NO. 144-FZ, NOV. 16, 1997

Section V. Execution of Award Issued by Arbitration Court

Article 24. Procedure for Execution of Award Issued by Arbitration Court.

An award issued by an arbitration court shall be executed voluntarily in accordance with the procedure and within the time limits provided in the award. In the event the time limits for execution of the award have not been specified in the award, the latter shall be subject to immediate execution.

Article 25. Enforcement of Award Issued by Arbitration Court.

Amendments were made in Article 25 of this Interim Provision by Federal Law No. 144-FZ of November 16, 1997.

In the event the defendant fails to execute the award within the established time limits, an enforcement order shall be issued by the Arbitrazh Court of the Russian Federation, or the Arbitrazh Court of the province, region, city, autonomous region or autonomous district where the arbitration court is located.

An application for issuance of an enforcement order is submitted by the successful party:

- to the Arbitrazh Court specified in Part 1 of this article;
- to the permanent arbitration court which has reviewed the case.

The application can be submitted within one month after expiration of the term for execution of the award issued by the arbitration court.

Documents confirming non-execution of the award issued by an arbitration court and evidence of payment of state duty shall be attached to the application.

The permanent arbitration court shall forward the application to the Arbitrazh Court entitled to issue the enforcement order within five days after receipt of the application.

In the event of failure to meet the time limits for submission of the application or failure to enclose the necessary documents, the Arbitrazh Court shall return the application without consideration.

Given justifiable reasons for failure to meet the time limits for submission of an application for issuance of enforcement order, the term may be restored by the Arbitrazh Court upon a petition filed by the party.

The application shall be considered by a sole Arbitrazh Judge within one month after its receipt by the Arbitrazh Court.

Upon consideration of the application, a ruling on issuance of an enforcement order or on refusal to issue an enforcement order shall be taken.

Article 26. Grounds for Refusal to Issue the Order.

The Federal Law on November 16, 1997, No 144-FZ, amended Article 26 of the present Interim Provision.

The Arbitrazh Court is entitled to refuse to issue an enforcement order in the event:

- the parties have not agreed on submission of the dispute to the arbitration court;
- the arbitration court panel or the procedure employed in consideration of the dispute did not correspond to the agreement of the parties regarding trial before an arbitration court;
- the defeated party was not duly informed of the date of the proceeding in the arbitration court or was not otherwise able to present its case;
- the dispute arose out of administrative or other relations, not civil relations, and was not subject to consideration by an arbitration court.

The ruling taken by the Arbitrazh Court may be appealed in accordance with the procedure stipulated by the Arbitrazh Procedural Code of the Russian Federation.

If it shall be established in the course of consideration of the application for issuance of an enforcement order that the decision does not comply with legislation or has been adopted without consideration of submitted materials, the Arbitrazh Court shall resubmit the case for a new trial before the arbitration court that issued the award on the case.

In case it is not possible to submit the case to the same arbitration court, the claim may be submitted to the Arbitrazh Court in accordance with established court jurisdiction.

REPLY

BRIEF

Supreme Court U.S.
FILED
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No. 01-1796

In the Supreme Court of the United States

BASE METAL TRADING, LIMITED,

Petitioner,

v.

OJSC "NOVOKUZNETSKY ALUMINUM FACTORY," ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

BRUCE S. MARKS
Counsel of Record

DAVID A. NILES
MARKS & SOKOLOV, LLC
1835 MARKET STREET
28TH FLOOR
PHILADELPHIA, PA 19109
(215) 568-8901

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Base Metal Trading, Ltd. ("Base Metal") respectfully submits this Reply in support of its March 6, 2002 Petition for a Writ of Certiorari (the "Petition") and in response to the Opposition Brief (hereinafter "Opp.") of Respondent OJSC "Novokuznetsky Aluminum Factory" ("NKAZ").

I.

THE FOURTH CIRCUIT'S RULING CONTRADICTS *SHAFFER V. HEITNER*

NKAZ makes three principal arguments in an attempt to harmonize the decision of the Fourth Circuit with *Shaffer v. Heitner*, 433 U.S. 186 (1977), and thereby convince this Court that the writ should not be granted.

First, NKAZ argues that *Shaffer* holds that presence of property in a district, without more, can never be a sufficient basis for jurisdiction under the "minimum contacts" standard of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (Opp. at 12-13). To the contrary,

> due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe, 326 U.S. at 316 (citations omitted). Just months after Justice Marshall authored the majority opinion in *Shaffer*, he explained, in another majority opinion, that "[l]ike any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' [*i.e.* minimum contacts] are present." *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978) (citations omitted). The *Shaffer* Court did not set a minimum threshold number of contacts that are required to satisfy *International Shoe*. To the contrary, *Shaffer* specifically held that where "it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff" the use of property alone to acquire jurisdiction entails "no unfairness in ... an action to realize on that debt ...." *Shaffer*, 433 U.S. at 210, n. 36.

Both *Shaffer*'s result and analysis confirm that the *sine qua non* of fairness and due process under the "minimum contacts" test is the opportunity for a party to defend against the merits of a claim in a forum that has proper *in personam* jurisdiction. *Shaffer* struck down Delaware's sequestration statute because it violated the due process rights of non-resident officers and directors of a corporation by allowing sequestration of their stock, located in Delaware, to establish jurisdiction to *litigate the merits* of their alleged liability in a shareholders' derivative suit. *Shaffer*, 433 U.S. at 212.

Consequently, the Fourth Circuit misapplied *Shaffer* when it mechanically held that a "single shipment" of aluminum was insufficient to confer jurisdiction under the minimum contacts test. (8a - 9a). A single contact – *e.g.* property present in the jurisdiction – can constitute sufficient "minimum contacts" where a party seeks to satisfy or secure

a valid adjudicated debt. To hold otherwise would merely encourage the evasion of valid, legal obligations.[1]

Second, NKAZ alternatively argues that the presence of property, without more, only satisfies the minimum contacts requirement when the court seeks to secure or satisfy a state court judgment "that would be entitled to full faith and credit" (Opp. at 14) and that an arbitration award does not have the "same status as a court judgment [or] binding effect." *Id.* However, NKAZ cites only to cases involving *domestic* arbitrations and ignores the caselaw interpreting the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards (the "Convention"), which affords lawful foreign arbitration awards full faith and credit under Art. IV, § 1 of the United States Constitution as if they were judgments. *See In re Fotochrome, Inc.*, 377 F.Supp. 26, 30 (E.D.N.Y. 1974) *aff'd sub nom, Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975); *see also Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120 (9th Cir. 2002) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

Third, NKAZ argues that various potential challenges to the arbitration award under the Convention somehow

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[1] NKAZ goes as far as to suggest that the arrest of the aluminum in this case was inappropriate because there "is no evidence that NKAZ was seeking to move its property to Maryland in order to avoid its obligations in Russia...." (Opp at fn. 6). Beyond the fact that allegations to this effect were raised in the district court, but Base Metal was denied discovery (*see* Joint Appendix below at 83-84 *and* 27a – 28a), these allegations are also raised in a civil RICO action encaptioned, *Base Metal Trading, SA v. Russian Aluminum et al.*, Docket No. 00 Civ. 9627 (JGK) (S.D.N.Y.).

render the hearing of the issues raised in this Petition to be unfair and inappropriate (Opp. at 16-17). However, these purported challenges are merely "defenses" to the enforcement of arbitral awards that are set forth in Article V of the Convention, which would not be determined until after the district court takes jurisdiction. Therefore, these issues are no bar to this Petition and would more properly be adjudicated by the district court only after the jurisdictional issue is decided.[2]

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[2] NKAZ's argument that Base Metal engaged in wrongful conduct rings particularly hollow, given that the principals associated with NKAZ, *i.e.* Gregory Louchanski and Mikhail Chernoi, have been convicted or indicted in connection with money laundering and embezzlement. *See Hearing on the Bank of New York and Russian Money Laundering Before the House Committee on Banking and Financial Services*, 106th Cong., 1st Sess. (Sept. 21, 1999) (statement of R. James Woolsey, former Director of the Central Intelligence Agency) ("I agreed with my successor, Mr. Deutch's public statement during his tenure that one of the groups involved with organized crime in Russia was Mr. Louchansky and his company, Nordex."); J. Nisse, *Israelis Probe $630m C&W Sale,* THE INDEPENDENT LONDON, April 8, 2002 (describing money laundering probes involving Chernoi in Russia, Switzerland and the US). Furthermore, NKAZ's suggestion that Base Metal should enforce its award in Russia is, at best, disingenuous, given its knowledge that Base Metal has alleged, in an action entitled *Base Metal Trading, SA v. Russian Aluminum, et al.*, Docket No. 00 Civ. 9627 (JGK) (S.D.N.Y.), that NKAZ's now principals have engaged in murder, extortion, racketeering, and the institution of a corrupted Russian court proceedings specifically to defraud legitimate creditors, including Base Metal, making Russia an unsuitable forum.

II.

A CONFLICT AMONG THE CIRCUITS ON THE PROPER INTERPRETATION OF *SHAFFER V. HEITNER* EXISTS AND MAY DEEPEN

Despite the clarity of the logic and language of *Shaffer*, two Circuit Courts of Appeal have disagreed on the scope of its holding.[3] The Fourth Circuit rejected the concept

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[3] Contrary to NKAZ's argument, *Seetransport Wiking Trader Schiffarhtgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 580 (2d Cir. 1993) did not hold that the presence of property alone in a district cannot satisfy the minimum contacts test. Rather, the Court found jurisdiction in that case. NKAZ's reliance on *American Construction Mach. & Equip. Corp. v. Mechanised Construction of Pakistan*, 1986 U.S. Dist. LEXIS 28551 (S.D.N.Y., Mar. 6, 1996), is similarly misplaced. *See* Opp. at 20. When the passage quoted by NKAZ is read in context, *American Construction* must be read as either supporting Base Metal's position or adopting a third possible interpretation of *Shaffer*, which would cause even more confusion, if it were ever adopted by a Circuit court. The *American Construction* court upheld the use of attachment jurisdiction for the purpose of enforcing a Swiss arbitration award and stated that "the *Shaffer* decision hinged on the jurisdictional issue of property within the district, and concerned the enforceability of a domestic state judgment, and may not be applicable to the other forms of 'minimum contacts' or to enforcement of an arbitral award based on treaty." *Id.* at *14-15 (*quoting Shaffer* at 210-11, n.36). The only other case in the Second Circuit addressing this issue, *CME Media Enters. B. V. v. Zelezny*, 2001 U.S. Dist. LEXIS 13888 (S.D. N.Y. 2001), held that property was a sufficient basis to exercise jurisdiction to confirm and enforce a foreign arbitration award.

of jurisdiction by attachment when it held that a "single shipment does not amount to 'continuous and systematic' contacts" sufficient to allow the district court to take jurisdiction. (8a - 9a). In *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), the Ninth Circuit held, on first impression, that *Shaffer* was "strong authority" for Glencore Grain's position that "it [could] enforce the award against Shivnath Rai's property in the forum even if that property has no relationship to the underlying controversy between the parties." *Id.* at 1127.[4]

The status of this issue in the Circuits is clearly evolving, and on August 15, 2002 the Third Circuit will hear oral argument on the precise issue under *Shaffer* presented here in the matter entitled *Base Metal Trading, Ltd. v. OJC "Novokuznetsky Aluminum Factory"*, App. No. 01-3348 (3d Cir.), which concerns the arrest of a different shipment of aluminum by Base Metal, in an action in which the district court again dismissed for lack of jurisdiction. Additionally, this precise legal issue may arise in the Fifth Circuit if Yukos, one of Russia's largest oil companies, contests an attachment order against an oil shipment, based on a foreign arbitration award that was recently entered in *Dardana Ltd. v. Yukos Oil Company*, No. 02-Civ.-2517 (S.D.Tex.). *See* M. Frike, *Heralded Russian Oil Cargo to US Lands in Legal Mess*, DOW JONES NEWSWIRE, July 18, 2002. The need for this Court to decide this jurisdictional issue and provide instruction to the lower courts is compelling.

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[4] Glencore Grain was unable to benefit from this holding of law and enforce its award because no property of the debtor could be found within the district. *Id.* at 1128.

III.

THE ISSUE PRESENTED BY THIS PETITION IS RIPE FOR REVIEW ON ASSUMED FACTS TO ALLOW THIS COURT TO PASS ON AN IMPORTANT ISSUE OF PUBLIC POLICY AND INTERNATIONAL LAW

NKAZ' offers several purportedly "compelling reasons" why the Petition is somehow not ripe for review. (Opp. at 20-23). However, none of these reasons are valid; nor do they alter the fact that the Petition presents an important question of public and international policy that can be decided solely as an issue of law.

First, NKAZ argues that the Court should not take this Petition because Base Metal did not raise its argument regarding attachment jurisdiction under *Shaffer* below. (Opp. at 20-21). This is simply not true. The Fourth Circuit expressly considered Base Metal's property-based argument despite NKAZ's objection that it was a "new argument". *See* NKAZ Appellee's Br. at 35 Moreover, the issue of whether Base Metal had established sufficient contracts of NKAZ with Maryland for the district court to invoke jurisdiction under *International Shoe* was the subject of considerable briefing and argument in the district court. This necessarily encompassed evaluation of the aluminum itself as a contact with the jurisdiction because the presence of property at a minimum "might suggest the existence of other ties among the defendant, the State, and the litigation." *Shaffer*, 433 U.S. at 209.

Second, NKAZ argues that this case is moot and Base Metal has no practical remedy because both the aluminum and the escrowed funds were released by the district court. (Opp.

at 21). However, Base Metal would have a cause of action against MG Metal for the value of that aluminum, if the district court took jurisdiction, and Base Metal proved either that the aluminum belonged to NKAZ when it was seized or that it was transferred to MG Metal through a sham transaction merely to avoid creditors of NKAZ. In addition, regardless of whether Base Metal is able to recover against this metal (or its proceeds), it still has an interest in confirming the arbitration award for use in further collection efforts.

Third, NKAZ argues that the Petition raises the jurisdictional question under *Shaffer* on mere "hypothetical facts" (Opp. at 20), and this matter is not ripe for review by the Court, because "there is no longer any alleged NKAZ property within the jurisdiction of the court, and thus no basis for the Court to sustain *quasi in rem* jurisdiction." (Opp. at 20-21). However, NKAZ ignores the fact that the district court, and the Fourth Circuit, rendered their decisions below in the context of a motion to dismiss, which required them to assume the jurisdictional facts as alleged by Base Metal to be true. *Seetransport*, 989 F.2d at 580; *accord Wolf v. Richmond County Hosp.*, 745 F.2d 904, 908 (4th Cir. 1984). Therefore, the district court was correct to merely note the conflict in evidence regarding ownership of the aluminum seized and assume, for the purposes of the motion to dismiss, that the aluminum in question was the property of NKAZ. *See* 27a. This Court should similarly decide this Petition on the record as constituted below, which was properly determined at the time the aluminum was seized. *See Newman-Green, Inc. v. Alfonzo-Larrain et al.*, 90 U.S. 826, 831 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."). Thus viewed, the jurisdictional issue here is solely an issue of law, and it is irrelevant for jurisdictional purposes that the metal

was subsequently released after the case was filed.

Fourth and finally, NKAZ argues that application of attachment jurisdiction under *Shaffer* in the instant case would "seriously interfere with the flow of international commerce." (Opp. 22). This argument is contrary to logic and the assessment by the United States Congress in ratifying the Convention. The United States adopted the Convention to increase the effectiveness of international arbitrations, thereby increasing the stability of international economic transactions, and to promote international trade. *See Glencore Grain*, 284 F.3d at 1120; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Common sense also suggests that predictability in the enforcement of foreign arbitration awards will increase reliance on them as a favored means of resolving disputes that arise from international transactions – the precise goal of the Convention.

CONCLUSION

For the foregoing reasons those stated in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

BRUCE S. MARKS, ESQ.
(*Counsel of Record*)
DAVID A. NILES, ESQ.
Marks & Sokolov, LLC
1835 Market Street, 28th Floor
Philadelphia, PA 19109
(215) 568-8901

Counsel for Petitioner